TESTIMONY OF JEFFREY M. BUCHER
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

HEARING ON
INDIAN TRUST RE-SOLUTION CORPORATION ACT OF 2000
(DISCUSSION DRAFT)

June 22, 2000

My name is Jeffrey M. Bucher. I am a partner with the law firm of Lillick & Charles LLP in Orange County, California. For more than forty years, I have specialized in legal matters concerning the supervision and regulation of financial institutions. I also am a former Member of the Board of Governors of the Federal Reserve System, where, among other responsibilities, I was Chairman of the Federal Reserve System Committee on the Reserve Bank Employee Benefit Trust Plans. Prior to my service as a Federal Reserve Governor, I headed the trust and investment division of a major West Coast bank. I currently serve on the board of directors and trust committee of a California commercial bank.

Over many years of law practice, I have worked with trust banks and commercial bank trust departments on issues involving almost every aspect of their fiduciary activities. Furthermore, as a member of the Lillick law firm's Trust Group I am exposed to issues relating to active asset management, trust administration and operations centered on representation of institutional trustees and other professionals in establishing, administering, reconciling and rehabilitating complex trusts.

On July 14, 1999, my partner Donald T. Gray testified before this Committee in a joint session with the Committee on Energy and Natural Resources. In his testimony, which can be found at http://www.senate. gov/-scia/1999hrgs/trust7.14/gray.pdf, Mr. Gray focused on the General Accounting Office ("GAO") Report No. B-280590 on Indian Trust Fund Management. In my remarks, I will from time to time make reference to Mr. Gray's testimony.

I am pleased to have the opportunity to testify on the Discussion Draft of the Indian Trust Resolution Corporation Act of 2000 ("Proposed Act"). Although far from an expert on the Federal Indian trust management problems, working with my partner, Mr. Gray, on Indian trust fund issues and, in particular, his testimony last year gave me the opportunity to become familiar with the High Level Implementation Plan prepared by the Department of the Interior ("DOI"), the GAO report on trust fund management within the DOI and the Strategic Plan issued by the Special

Trustee under the American Indian Trust Fund Management Trust Reform Act of 1994 ("1994 Act"), as well as the history of the Indian trust fund problems. In addition, following Chairman Campbell's invitation to appear before you today, I have spent considerable time updating myself

on the more recent developments in this area, particularly the Proposed Act, which would create the Indian Trust Resolution Corporation, and the Oversight Board.

Issues To Be Addressed

In my testimony today, I propose to address the following issues which, from my perspective, stand out as the most important, as well as generally positive, aspects of the Proposed Act, independence and expertise.

In addition, I will offer some technical suggestions regarding the proposed Amendments to the 1994 Act which provide for the Secretary of the Interior ("Secretary") to enter into contracts with qualified financial institutions for the investment of funds held in trust status for Indian tribes and individual Indians by the DOI.

Independence

The Special Trustee's Strategic Plan called for an independent and neutral body, for example a Government Sponsored Enterprise, to assume the Indian trust fund rehabilitation process. In this connection, the Special Trustee cited the ongoing conflict within the DOI in failing to separate its special trust reform fiduciary goals from its general responsibilities in education, housing, law enforcement, welfare programs and other American Indian services provided by the DOI and the Bureau of Indian Affairs ("BIA"). The Special Trustee concluded that, in competition for the limited funds appropriated to DOI, when a choice must be made between its general responsibilities and Indian trust fund reform, the latter program would inevitably suffer. In other words, the Special Trustee had come to the conclusion that, in order to effectively resolve the Indian trust fund problems, an entity separate from the DOI appeared to be necessary.

In the same vane, Mr. Gray in his testimony discussed at length the benefits of separating the "trust fix" project team from those persons historically involved with administering the "broken trusts". However, Mr. Gray emphasized that those present BIA employees, who can offer valuable historic knowledge of the process, should know that as potentially important contributors to the reconstruction effort their future employment will involve solving the trust fund problems, not taking blame for errors committed in the past.

The Proposed Act addresses the independence issue by establishing the Indian Trust Resolution Corporation ("Corporation") as an instrumentality of the United States. The Proposed Act states that it is the purpose of the legislation to create a temporary Federal agency independent of the DOI and the Department of the Treasury that will have the ability and authority to address and resolve long-standing Indian trust management problems and to ensure that the Federal Government fulfills its trust responsibilities to American Indian trust beneficiaries. The Proposed Act also sets out the management structure and duties of the Corporation; staffing matters; corporate powers; and other issues related to the management and operation of the Corporation.

In addition, the Proposed Act creates an Oversight Board ("Board') to oversee the activities of the Corporation. The Board is to be comprised of the Secretary of the Treasury, the Secretary of the Interior, Chairman of the Federal Reserve Board, the Comptroller of the Currency ("OCC"), the Chairperson of the Federal Deposit Insurance Corporation ("FDIC") and the CEO of the Corporation. Also, the Board will have five (5) independent members to be appointed by the President with the advice and consent of the Senate. At least four (4) members of the Board are to be members of an Indian tribe.

Among other responsibilities, the Board shall have the duty to review all strategies, policies and goals established by the Corporation, including policies for case resolutions, the management and disposition of assets, the use of private contractors, and the Corporation's financial goals, plans budgets, and related matters.

Finally, the Proposed Act requires the Secretary to transfer to the Corporation certified copies of all records materially related to the trust funds of tribes and individual Indians, while legal title to the Indian trust funds would remain with the DOI. In addition, all functions and responsibilities of the Office of Special Trustee for American Indians, created under the 1994 Act, shall be transferred to the Corporation.

It is my opinion that the Proposed Act successfully addresses the important issues regarding independence which were discussed in the Special Trustee's Strategic Plan. Further, I believe that the related concerns regarding conflict of interest, which Mr. Gray covered in his testimony, would likewise be substantially resolved should the Proposed Act be adopted. Finally, I would add my own opinion that, if enacted in the form of the Discussion Draft, a major positive step will have been taken to establish an institutional framework for successfully resolving the Indian trust fund problems.

Expertise

Mr. Gray, in his testimony, concurs with the Special Trustee in his Strategic Plan where it was stated that:

"Managers and staff of the BIA have virtually *no effective knowledge or practical experience* with the type of *trust management* policies, procedures, systems and *best practices* which are so effective, efficient and *prevalent in private sector trust departments and companies.* The BIA area and field office managers do not have the background, the training, the experience, the financial and trust qualifications and skills, necessary to manage the Federal Government's trust management activities according to the exacting fiduciary standards required in today's modem trust environment. Thus, and through no fault of their own, and *even assumingfinancial resources were made available, they are not capable of managing effectively the Federal Government's trust management activities on a par with* that provided by *private sector institutions* to their customers..." [emphasis added]

Mr. Gray went on to state that "(i)f your or my bank or trust company were to handle our assets with completely unqualified personnel, in a manner that can be described metaphorically as

a "shoe box" approach to accounting, we would be in court, or on the steps of the OCC or other appropriate regulator the next morning." I fully concur with Mr. Gray's statement.

As I indicated earlier, the Proposed Act's creation of the Corporation as an agency of the United States, independent from the DOI and BIA, would be a major step forward in creating a workable structure for resolving the Indian trust fund problems. In regard to attracting the necessary expertise to accomplish this task, the Proposed Act gives the Corporation the power to staff its case resolution activities from a number of sources, including the private sector, other Federal agencies as well as current BIA employees. Also, it would appear that the Corporation has the power to employ private contractors for the purpose of accomplishing the objectives of the Proposed Act.

The apparent broad power to staff the activities of the Corporation with a mix of Federal employee and private contract professionals affords the Corporation's management the flexibility to address the Indian trust fund problems in a way that should produce the desired results. With BIA employees, the Corporation would have the benefit of the historical perspective regarding the Indian trust accounts to be reconciled. By having the ability to utilize the personnel resources of any Federal executive department or agency, other than the DOI, in its mission, adds another important dimension to the Corporation resource capacity. Finally, the power given to the Corporation's management to employ independent private sector contractors to assist it in its Indian trust account resolution activities is a major plus. However, I am assuming that, with the power to employ independent contractors, the Corporation will be able to compensate them at private sector rates.

As Mr. Gray stated in his testimony, "(w)ith the growing complexity of investment vehicles, asset-backed securitizations and their correspondingly complex cash flows (not unlike the IIN4 accounts), modem trust administration requires a level of financial and technical expertise that was unheard of twenty years ago." Thus, it seems to me that the provisions of the Proposed Act, which would provide the Corporation with a wide range of staffing options, will afford its management with the tools necessary to meet the enormous challenges which resolution of the Indian trust fund accounts present.

One more comment on the potential use of BIA employees to work for the Corporation towards the fulfillment of its duties. The Proposed Act contemplates that the responsibility for the administration and management of the Indian trust accounts will be transferred back to the DOI upon acknowledgment by Congress that the work of the Corporation has been completed. Furthermore, the inference is that, at the time of such transfer, the BIA employees who have been working for the Corporation on the Indian trust funds resolution project will be reassigned to the BIA. Therefore, one can hope that the experience which BIA employees will have gained while employed by the Corporation will serve them and the BIA in good stead to prevent future management practices regarding the Indian trust funds resembling those of the past.

Another source of expertise, which is available to the Corporation, is the Oversight Board. Needless to say, it is hard to conceive of a more qualified group of individuals in the area of financial transactions than the Secretary of the Treasury, the Chairman of the Federal Reserve

Board, the Comptroller of the Currency and the Chairperson of the FDIC. Of course, the Secretary of the Interior will have access to important knowledge regarding the Indian trust accounts and other aspects of the DOI's relationships with Indian Country. In addition, requiring that four (4) of the five (5) independent members of the Board be a member of an Indian tribe would give the Board important input from persons having special knowledge of the needs of the persons most affected by the activities of the Corporation, the American Indians.

All in all, it is my view that the provisions of the Proposed Act strike an acceptable balance in terms of affording the Corporation and its management with the tools necessary to successfully accomplish its goal of addressing and resolving the longstanding Federal Indian trust management problems while preserving the DOI's historical role in serving as the American Indians' principal caretaker. In this connection, I must assume that the Treasury will provide adequate financial resources for the Corporation to accomplish the task.

Technical Suggestions Regarding Amendments To The 1994 Act

Included with the Discussion Draft of the Proposed Act are proposed Amendments To The American Indian Trust Reform Act of 1974 ("Amendments"). These Amendments provide that the Secretary, with the advice and assistance of the Comptroller of the Currency, shall enter into contracts with qualified financial institutions, that are regulated by a Federal bank regulatory agency, for the investment of all funds presently managed in trust status for Indian tribes and individual Indians by the United States. A tribe whose money is held in trust may request that the funds continue to be invested by the DOI. These Amendments becomes effective not later than 1 year after the date of enactment.

Before discussing the substantive provisions of the Amendments and some of my concerns regarding the same, I must say that I fully support the concept of requiring the DOI to use outside qualified investment advisors in the form of Federally regulated financial institutions to manage the Indian trust funds. However, there would appear to be an inconsistency in the prospective interaction of the investment management provisions of the Proposed Act and the proposed Amendments. While the Amendments explicitly require the Secretary, within one year from enactment thereof, to enter into contracts with qualified financial institutions to manage Indian trust fund investments, the language of the Proposed Act suggests that, although title to the Indian trust fund and trust fund assets will remain in DOI during the term of the Corporation's existence, the Corporation will have the power to invest Indian trust fund assets as well. These provisions create potentially overlapping responsibilities between the DOI and the Corporation. However, if I were asked to select the better procedure for handling the investment management responsibilities for the Indian trust funds, I would opt for utilizing the contracting procedures proposed in the Amendments.

Respecting the substance of the Amendments, I would like of offer the following comments, all directed to Section 401. Tribal Options:

(A) I am troubled by the language of subsection (d), Requirements of Contracts, paragraph (2), which permits tribes, consistent with the prudent investor rule of subsection (d),

paragraph (1), to direct financial institutions regarding the kinds of instruments for investment. As I am sure the Committee members are aware, managing trust assets is less than an exact science. Although the widely accepted Uniform Prudent Investor Act's provisions are helpful in guiding the investment of fiduciary assets, a number of variables come into play when a financial institution manages the investment of trust funds. For example, any prudent trustee investing fiduciary funds will need guidance regarding the purpose for which the trust funds are being invested and the time over which such investments should be held. For these purposes the trustee must know the reason the assets are being held in trust and when the beneficiaries of the trust will need them. In other words, if the beneficiaries have other resources on which to live, the trust can prudently invest under a program which has a more extended time horizon. On the other hand, if the beneficiaries are in immediate need of funds, an entirely different investment strategy is in order. Therefore, language in the Amendments giving the tribes power to direct a financial institution's investment activities could place the designated financial institution in a difficult, if not conflicting, situation.

As an alternative I would suggest that the language of subsection (d), paragraph (2) be modified to state that the financial institution shall consult with the tribes regarding the kinds of instruments for investment, rather than the tribe direct the financial institution in such matters. The effect of this new language would be that the financial institution could exercise its investment discretion in a manner that would best serve the varied needs of the beneficiaries, while taking into account the unique perspective of the Indian tribes.

(B) My comments in (A) above are equally applicable to the language of subsection (d), paragraph (4), which relates to the apparent absolute liability of the financial institution for any financial loss incurred by the trust beneficiary as a result of its failure to comply with the investment instructions provided by the tribe. In this connection, I suggest that subsection (d), paragraph (4) be modified by deleting the phrase "investment instructions provided by the tribe". However, I see no reason for not leaving in the paragraph the provisions that impose liability on the financial institution for failure to comply the terms of the contract, its general fiduciary obligations, or the prudent investor rule.

(C) Subsection (d), paragraph (5) imposes the requirement that the financial institution carry sufficient insurance or other surety satisfactory to the Secretary to compensate the trust beneficiary in connection with any liability. Although not an unreasonable requirement, it needs to understood that, because of the magnitude of the Indian trust funds assets, this provision will cause most, if not all, private trustees to increase their insurance coverage and resulting premium obligations to an extent that the result will be a significant increase in the cost to such institutions of managing Indian trust accounts.

(D) Finally, in subsection (d), paragraph (6), 1 am unclear about the practical effect of the reference to "reasonable costs" incurred in a financial institution investing Indian trust funds in U.S. guaranteed instruments, presumably Treasury bonds, notes and bills. Normally, a private sector trust company will apply investment management fees to Treasury securities investments as it would to other invested assets, such as equity securities or real estate. Of course, it is not unusual for a trustee to agree to a lower investment fee for Treasury securities investments than

for other assets, however, the concept of a reasonable cost pricing structure for U.S. Government obligations is unusual and may not be acceptable to financial institutions bidding for Indian trust fund contracts. I recommend that this provision be clarified.

Conclusion

Clearly the Proposed Act provides a excellent foundation on which can be built a structure which, if properly utilized, may lead to an acceptable solution to the age old Indian trust fund problems. However, before a workable program can be put in place, a number of challenges must be met. Among these are the selection of qualified management, employees and professional advisors to operate the Corporation and support the Oversight Board. Of course, the willingness of the DOI, the BIA and the Indian tribes and individuals to work together is an important element to the success of the undertaking. In addition, the willingness of Congress to appropriate the necessary funds to allow the Corporation and the Oversight Board to fulfill their respective missions over the term of the project is of critical importance.